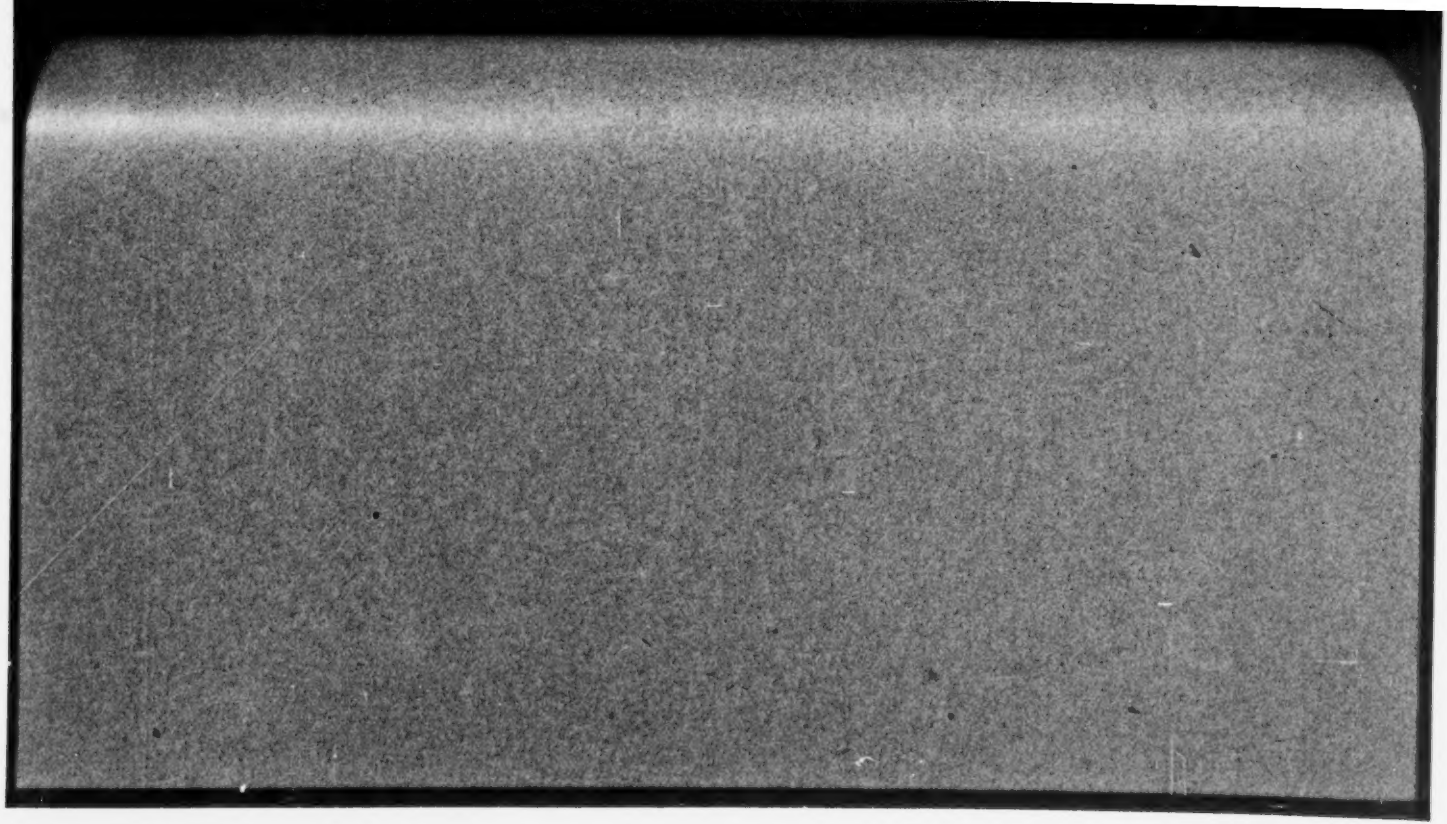

No. 201.
Mot. to vacate re.
Mot. of Wilbur & Partridge for P. E.
Gen. No. 17,639. Term No. 201.
OCT 18 1900
JAMES H. McKENNEY, Clerk

Filed Oct 18, 1900.

Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1900.

THOMAS F. FARRELL et al.,
Plaintiffs in Error,

vs.

THE WEST CHICAGO PARK COMMISSIONERS,
Defendants in Error.

Error to the Supreme Court of State of Illinois.

REPLY ON BEHALF OF PLAINTIFFS IN ERROR TO THE MOTION OF DEFENDANTS IN ERROR "TO VACATE THE SUPERSEDEAS ORDER GRANTED UPON THE ISSUING OUT OF THE WRIT OF ERROR IN SAID CAUSE."

GEORGE W. WILBUR.
NEWTON A. PARTRIDGE.
ATTORNEYS FOR PLAINTIFFS IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

22809

IN THE

Supreme Court of the United States

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MAY IT PLEASE THE COURT:

On the 14th day of May last, the plaintiffs in error presented a petition herein asking that a rule be entered against the defendants in error to show cause why they should not be punished for contempt in returning the assessment involved herein for collection to the county treasurer of Cook County, after the service of the citation. Counsel for defendants in error filed a brief in reply to such petition and to the brief on behalf of plaintiffs in error. On the 21st day of May your Honorable Court

entered a rule against the defendants in error to show cause why they should not be punished for contempt, which rule was made returnable October 8, *instant*. On the return day defendants in error filed their answer to the rule. At the same time they made a motion as above set forth. The motion was allowed to be entered without prejudice.

The brief filed by the defendants in error in reply to petition for rule to show cause contains, substantially, the same authorities as are found in their brief in support of the present motion.

The record in this cause has not, as yet, been printed, but plaintiffs in error filed a short abstract thereof at the time of presenting the petition for rule to show cause. If the points involved in the motion turned upon a question of fact, then the court would be compelled to look into the record and make an examination thereof, without any suggestion from counsel for defendants in error, as to the parts of the record which tend to support the allegations in his brief.

The record herein, as will appear by the abstract thereof, heretofore filed on behalf of plaintiffs in error, shows a strict compliance with the requirements governing such proceedings. The presumption is also in favor of the regularity and sufficiency thereof. A supersedeas bond was approved and filed as a part of the record.

We will state, briefly, that the County Court of Cook County rendered a judgment in favor of defendants in error, and plaintiffs in error took an appeal to the Supreme Court of Illinois. On December 21, 1898, that court reversed the judgment of the County Court and remanded the cause. On February 9, 1899, a rehearing was allowed on petition of the defendants in error, and on

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October 13, 1899, the Supreme Court reversed its former findings and entered a judgment in favor of the defendants in error. The plaintiff in error then filed a petition for rehearing, and on November 22, 1899, a stay order was entered therein by the Chief Justice of the Supreme Court of Illinois. On December 11, 1899, the petition for rehearing was denied. The abstract of record heretofore filed shows briefly what steps were taken in suing out the writ of error.

BRIEF.

I

THE WRIT OF ERROR WAS SUED OUT IN APT TIME.

Counsel for defendants in error argues that the time for suing out the writ of error commenced to run from the 13th day of October, 1899, the day when the Supreme Court of Illlinois set aside its former opinion in favor of the plaintiffs in error.

This point is unquestionably settled by many authorities, and against the position of counsel.

A petition for rehearing was filed on behalf of the plaintiffs in error, under the rules of the Supreme Court of Illinois, asking that the opinion of October 13, 1899, finding against them, be reconsidered. A stay order was entered on such petition on November 22, 1899. On December 11, 1899, the petition for rehearing was denied. The time for suing out a writ of error commenced to run from the day of the denial of the petition for rehearing. This point is fully sustained in

The Aspen Mining & Smelting Co. et al., Appts., v. *Margaret Billings et al.*,

and

Same v. *Margaret Billings, James O. Wood et al.*, 150 U. S. 30 (36).

The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Brockett* v. *Brockett*, 43 U. S., 2 How., 238, 239 (11: 251); *Texas & P. R. Co.* v. *Murphy*, 111

U. S., 488 (28: 492); *Memphis* v. *Brown*, 94 U. S., 715 (24: 244).

* * * * *

[36] In *Giant Powder Co.* v. *California Vigorit Powder Co.*, 5 Fed. Rep., 197, 6 Sawy., 508, it was said by Mr. Justice FIELD that equity rule 88 applies only where no petition is presented during the term, and the numerous cases in which it has been held that the time limited for an appeal does not begin to run until a petition for a rehearing properly presented has been disposed of, sustained that view. The decree does not, in legal effect, remain final while the petition is pending, and the prescription of rule 88 must be construed to mean that a rehearing cannot be granted after the lapse of the term unless application is made therefor during the term, and being entertained, the decree is thereby prevented from passing beyond the control of the court. The entertaining of the petition keeps the jurisdiction alive, and the granting of the rehearing may be made absolute, or denied, thereafter as the court may determine.

The same question is decided in the recent case of *Kingman & Company, Petitioner*, v. *Western Manufacturing Company*, 170 U. S., 675. On page 678–9 it is stated:

* * * The question here arose on a motion to vacate the supersedeas because the writ of error was not seasonably sued out within § 1007, Rev. Stat., sixty days having elapsed since the judgment was originally entered, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Under the ruling in *Brockett* v. *Brockett*, 43 U. S., 2 How., 241 [11: 252], the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a supersedeas." No reference was made to

any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law. Indeed, § 1012 of the Revised Statutes provides that appeals "shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error," and if the limitation on taking an appeal does not begin to run until after the denial of a pending petition for rehearing in an equity suit, it would seem to follow that this must be so as to bringing a writ of error after the overruling of a motion for a new trial.

The subject was much considered by Judge McCrary in *Rutherford* v. *Penn Mutual Life Insurance Company*, 1 McCrary, 120, where he held that "a writ of error will operate as a supersedeas * * * if duly served 'within sixty days, Sundays excluded,' after a motion for a new trial has been overruled," and by Judge Sabin in *Brown* v. *Evans*, 18 Fed. Rep., 56, where the same conclusion was reached, and it was held that where a motion for a new trial had been made and entertained, the judgment in the case did not become final and effectual for purposes of review until the date of the order of court overruling such motion. And see *Alexander* v. *United States*, 15 U. S. App., 158, 169; *Scott's Administrator* v. *Stockton*, 41 U. S. App., 579; *Andrews* v. *Thum*, 33 U. S. App., 430.

The plaintiffs in error had sixty days from the 11th day of December, 1899, in which to sue out the writ of error. The writ was sued out on January 23, 1900, and citation was served on defendants in error on February 2, 1900.

The plaintiffs in error ask that the motion to vacate the supersedeas order be denied.

Respectfully submitted.

GEO. W. WILBUR,

NEWTON A. PARTRIDGE,

Counsel for Plaintiffs in Error.

No. 201.

F 22012
OCT 18 1900
JAMES H. McKENNEY,
Clerk

Reply Brief of Wilbur & Partridge, for P. in E.

Filed Oct. 18, 1900.

Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1900.

THOMAS F. FARRELL et al.,
Plaintiffs in Error,

vs.

THE WEST CHICAGO PARK COMMISSIONERS,
Defendants in Error.

Error to the Supreme Court of State of Illinois.

REPLY OF PLAINTIFFS IN ERROR TO ANSWERS OF DEFENDANTS IN ERROR TO RULE TO SHOW CAUSE WHY THEY SHOULD NOT BE PUNISHED FOR CONTEMPT.

GEORGE W. WILBUR.
NEWTON A. PARTRIDGE.
ATTORNEYS FOR PLAINTIFFS IN ERROR

The Lakeside Press, Donnelley, Gassette & Loyd Co., Chicago.

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IN THE

Supreme Court of the United States

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Error to the Supreme Court of State of Illinois.

REPLY OF PLAINTIFFS IN ERROR TO ANSWERS OF DEFENDANTS IN ERROR TO RULE TO SHOW CAUSE WHY THEY SHOULD NOT BE PUNISHED FOR CONTEMPT.

MAY IT PLEASE THE COURT:

Upon a casual examination of the answers of defendants in error, we stated to your Honors that we did not deem it necessary to make reply. After a further inspection, however, we think a misunderstanding may result unless certain inconsistencies in such answers are pointed out.

One page 5 of the answers, the defendants in error state that after the 2nd day of February, 1900, and after the service of citation, they took no action of any kind respecting the writ of error sued out in said cause, and have not at any time before or since the 2nd of February,

1900, made or caused to be made a return to the county treasurer of Cook County, Illinois, or any other officer authorized to receive state and county taxes, of the lots and lands which had been assessed for benefits by reason of the improvement of Douglas boulevard, and claimed to be owned by plaintiffs in error. This statement seems to be in direct conflict with what appears on page 6 of such answers, where it is stated that on February 2, 1900, when citation was served, they had an officer known and recognized, in the laws of Illinois, as collector of special assessments; that said collector had and now has authority to do and perform all lawful acts necessary under and consistent with the laws of said state, in the collection of all special assessments lawfully levied by respondents. Respondents show that on said day John I. Straw had been such collector for more than six months prior thereto, and is now collector of all special assessments lawfully levied by respondents.

The respondents evidently seek to put the whole responsibility of the return of the assessment for collection upon Straw, and they would have us conclude that the collector, appointed in the manner set forth in their answers, is entirely independent, and beyond their control. We do not believe this to be true.

On page 8 of the answers, respondents insert a copy of a notice, signed by one of the counsel for plaintiffs in error, stating that unless defendants in error withdraw from collection the special assessment for the improvement of Douglas boulevard, and cease all further effort to collect the same, in so far as it relates to lots of plaintiffs in error, proceedings will be commenced in the Supreme Court of the United States, and a rule will be asked against them to show cause why they should not be pun-

ished for contempt in violating the writ in said cause, and the statutes of the United States in such case made and provided. This notice bears date April 12th, 1900, or more than one month prior to the filing of the petition for the rule to show cause. The notice further discloses an effort on the part of the plaintiffs in error to avoid bringing the matter before your Honorable Court.

Respondents further say that this notice was the first information they received that the return of the lots of plaintiffs in error had been made to the county treasurer as delinquent for the non-payment of said assessment.

On page 9, respondents state that they did not withdraw, and did not, at that time, request the county treasurer to withdraw from collection said special assessment for the reason that they were advised by counsel that the writ sued out by plaintiffs in error did not operate as a supersedeas or suspend the right of the county treasurer to proceed with the collection of said assessment. Respondents show that after the rule had been entered they caused the withdrawal of all lots and lands of plaintiffs in error which had been returned by Straw, as collector, to said county treasurer as delinquent for the non-payment of said special assessment, from the application which had been made for judgment of sale thereof. This order was entered on July 26, 1900, or more than two months after the entry of the rule to show cause why they should not be punished.

On July 27, 1900, the day following the entry of the order last referred to, an order was entered in the County Court overruling the objections of plaintiffs in error, and a judgment of sale was taken against the property described in such objections. No exception is

made of the property described in the order of July 26. (Exhibit E, page 22, Abstract of Statement, etc.)

The respondents state in their several answers that they were acting under the advice of counsel in the matter and that they were advised, in effect, that the supersedeas order did not interfere with the collection of the special assessment involved herein. While counsel, prior to the 21st day of May, 1900, might have given such advice with the best of intentions and with an honest belief that it was in harmony with the law, yet, what excuse is there which can be consistently given either by the counsel or by respondents for advertising the property as delinquent, or permitting it to be done on the 15th day of June, 1900, nearly a month after the entry of the order to show cause, and also for allowing the assessment to remain on the collector's books until the 26th day of July, 1900? To us, the acts of counsel and the acts of the respondents after the 21st day of May, 1900, show not only a disregard of the order of that date, but an inexcusable ignorance of the authorities of your court. While the respondents may have leaned upon their counsel and may have been guided by his advice in regard to the notice served upon them on April 12, 1900, and also in regard to the preliminary proceedings which resulted in the entry of the order of May 21, they certainly were not justified in allowing such order to pass unnoticed until the 26th of July.

Counsel for defendants in error has attached his affidavit to the answers of respondents. We will allow this affidavit to pass without criticism, other than to say that the order of July 27, overruling the objections of plaintiffs in error, does not except their property therefrom, and as appears from the record presented herewith, there

is now a judgment of sale still appearing upon the record of the County Court against the property of the plaintiffs in error.

We do not feel that the respondents herein should be excused from all responsibility by reason of their actions, as set forth in the various documents presented herewith. Neither do we feel that the plaintiffs in error should be called upon to bear the burden of the uncalled-for expense that has been forced upon them by the respondents, even though their actions may have been prompted, in whole or in part, by advice of counsel. That such advice was not well given, is clearly shown by authorities appearing in our brief herein.

All of which is respectfully submitted.

GEO. W. WILBUR,
NEWTON A. PARTRIDGE,
Counsel for Plaintiffs in Error.